SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 175

PETSONELLA MORACCHINI, as personal representative of the Estate of EDWARD [illegible], Jr., deceased, and PETSONELLA MORACCHINI, individually,

Petitioners,

vs.

STATES MARINE LINES, INC., a corporation,

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Impleaded.

On Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

BRIEF ON BEHALF OF
GULF FLORIDA TERMINAL COMPANY, RESPONDENT

[illegible]

[illegible]

[illegible]

[illegible]

Counsel for Respondent
Gulf Florida Terminal Company

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vs.

STATES MARINE LINES, INC., a corporation,

Respondent,

vs.

GULF FLORIDA TERMINAL COMPANY, a corporation,

Respondent.

On Writ of Certiorari
To The United States Court of Appeals
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BRIEF ON BEHALF OF GULF FLORIDA TERMINAL COMPANY, RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is officially reported at 409 F.2d 32. The opinion of the Supreme Court of Florida is officially reported at 211 So.2d 161. The opinion of the District Court, Middle District of Florida, Tampa Division, is unreported and appears in the Appendix at Page 13.

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is predicated upon 28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions which Petitioner asserts are involved in this appeal are set forth in Petitioner's brief at pages 4 and 5.

QUESTION PRESENTED FOR REVIEW

Whether there exists a right of action for wrongful death in admiralty law independent of a statute specifically furnishing such a right and remedy.

STATEMENT OF THE CASE

The factual background together with the significant developments of this case in the lower courts is adequately stated in Petitioner's brief at pages 6 through 9.

ARGUMENT

I

QUESTIONS RAISED BY PETITTIONER WERE NOT PRESERVED BELOW

Respondents Gulf Florida Terminal Company and States Marine Lines, Inc. heretofore filed a joint brief in opposition to the Petition for a Writ of Certiorari filed by Petitioner in this case. Respondent States Marine Lines, Inc., in Point I of its separate brief filed in

this cause has reiterated in detail the arguments and authorities set forth in the joint brief of Respondents upon the issue that the orderly administration of cases on appeal preclude the assertion of grounds and issues not raised and preserved in the lower courts; this principle is of especial import where, as here, Petitioner affirmatively sought construction of the Florida wrongful death statute by the Supreme Court of Florida.

Respondent Gulf Florida Terminal Company, rather than repeat in detail what has heretofore been ably presented by Respondent States Marine Lines, Inc., joins in and incorporates the argument of States Marine Lines, Inc. hereunder.

II

THE HARRISBURG AND THE TUNGUS SHOULD NOT BE REVERSED; CREATION OF CAUSE OF ACTION FOR WRONGFUL DEATH IS A LEGISLATIVE FUNCTION

That a right of action and remedy for wrongful death is a function of the Legislature has been fully discussed and documented under Point III of the brief on behalf of Respondent States Marine Lines, Inc. Of especial significance is the multitude of problems facing a Legislature in devising a right of action and remedy for wrongful death; again, all of these problems have been fully discussed and presented in the aforementioned brief filed by Respondent States Marine Lines, Inc.

Although the briefs *amicus curiae* filed in this cause assume that this Court can, by overruling *The Harrisburg* (1886), 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed 358, and *M/V Tungus v. Skovgaard* (1959), 358 U.S.

588, 79 S.Ct. 503, 3 L.Ed 2d 524, develop judicially a right and remedy for wrongful death, it is significant to note that Petitioner is reluctant to go so far. At page 36 of Petitioner's brief, under the heading "Practical Considerations" Petitioner says that in the event the Court should overrule *The Harrisburg,* that:

> "* * * the Court should lay down some general guide lines as to future practice in matters concerning survival and wrongful death."

It is clear that Petitioner is well aware of the numerous problems involved in the *judicial development* of a cause of action and remedy for wrongful death which have been called to the attention of the Court.

The brief of Petitioner, together with the briefs *amicus curiae,* have not considered the significance and impact of a Bill presently pending in the United States Senate.[1] The bill in question seeks to amend the Death on the High Seas Act, 46 U.S.C. 761, in various respects. Of critical import is the provision which would extend coverage of the Act to the navigable waters of the respective states; that is, the marine league limitation presently appearing in the Act would be removed. In essence, the present Bill would cover the issues now pending in this Court; the Bill would provide a federal right of action and remedy for wrongful death in favor of beneficiaries, named in the Bill, of persons killed upon the "navigable waters of the United States, the District of Columbia, Puerto Rico, or the territories or

[1] Bill No. S. 3143, entitled "A Bill to Amend the Act Known as the Death on the High Seas Act". The Bill was introduced by Senator Magnuson; it is dated November 14, 1969 and has been referred to the Committee on Commerce. The text of the Bill is set forth in Appendix A to this brief.

dependencies of the United States, or beyond such navigable waters occurring on the high seas, including acts or occurrences on fixed structures therein." The impact of this Bill upon the instant case is manifest; the Court is being asked to judicially legislate upon a matter which is presently being considered by the Congress.

In view of the multiple problems inherent in a judicially created right of action for wrongful death, and in view of the Bill presently pending in the United States Senate concerning the identical matters presented in this appeal, it is submitted that this Court should decline to overrule or to retreat from *The Harrisburg* or *The Tungus*. If change in the law is necessary it should come from Congressional action now pending and under consideration.

III

APPLICATION OF THE FLORIDA WRONGFUL DEATH ACT DOES NOT VIOLATE THE CONCEPT OF UNIFORM APPLICATION OF FEDERAL LAW IN MARITIME MATTERS

A. *Reversal of The Harrisburg and The Tungus Cannot be Justified Under the Guise of Uniformity*

Petitioner seeks reversal of the opinion below upon the theory that application of the Florida Wrongful Death Act, Section 768.01, Florida Statutes, does violence to the concept of uniformity in maritime law. Petitioner contends that the holding in this cause is in conflict with decisions of other circuits in cases construing the wrongful death acts of states *other than* Florida. Petitioner is content with those decisions applying particular state wrongful death acts when such acts have been construed by state or federal courts to

include a cause of action for unseaworthiness. However, Petitioner strenuously objects to the ruling below which applied the wrongful death statute of Florida in accordance with the construction of that statute by the Supreme Court of Florida. Petitioner says that the result below cannot be maintained in that it destroys the uniformity of admiralty law and allows the State of Florida to inject its substantive law into a cause in admiralty. It is clear that Petitioner's argument is inconsistent; there is a uniformity of application irrespective of whether a particular state statute does or does not include a cause of action for unseaworthiness. Furthermore, the instant case does not fall within that doctrine of uniformity discussed in *The Lottawanna* (1874), 88 U.S. 558, 22 L.Ed 654, and subsequently in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed 1086.

The Harrisburg (1886), 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed 358, teaches that in admiralty there is no right or cause of action for wrongful death.[2] Subsequent to *The Harrisburg*, federal courts have been even handed in the application of this rule. Actions for wrongful death are maintainable in admiralty where there is a statute giving such a right and providing a remedy therefor. *M/V Tungus v. Skovgaard* (1959), 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed 2d 524, was a reaffirmation of the principle enunciated in *The Harrisburg*, and it likewise has been even handedly applied. Neither *The Harrisburg* nor

[2] A review of *The Harrisburg* shows that the Court carefully reviewed existing precedents, both for and against the proposition that admiralty law recognizes a cause of action for wrongful death, and then held that the general admiralty law of maritime nations did not recognize such a cause of action absent a statute so providing. Contrary to Petitioner's suggestion, *The Harrisburg* was not an irrational departure from established jurisprudence.

The Tungus has engendered confusion or disunity in application. When suit is brought for the wrongful death death of a maritime worker killed within the admiralty jurisdiction, the federal courts give relief pursuant to the wrongful death statute of the state wherein the death occurred. Although it is recognized that the present rule of law leads to different results dependent upon which state statute is being applied, this does not give rise to that type of non-uniformity which the admiralty abhors. The early cases, premised upon the constitutional grant of admiralty jurisdiction to the federal courts, established the principle that general maritime law was uniformly applicable within the admiralty courts. *The Lottawanna* (1874), 88 U.S. 558, 22 L.Ed 654. In *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed 1086, the Court struck down an attempt by Congress to incorporate into the general admiralty law the respective workmen's compensation statutes of the various states. The basis of the ruling in *Jensen* was that the Congressional attempt to saddle ship owners with the burdens of state compensation acts was destructive of uniformity in the administration of maritime law. The application of the doctrine of uniformity in *Jensen* can be sustained. What Congress sought to do was to require ship owners to comply with a variety of workmen's compensation statutes which were then in effect in the several states. It is clear that such an attempt would have burdened the ship owners operations between the states and foreign nations. The *Jensen* opinion itself outlines some of the burdens placed upon the ship owners by the New York statute in question in that case (244 U.S. 205, 214).

A clear distinction exists between *Jensen* and the present rule of law in the area of wrongful death actions. What Petitioner's argument overlooks is that her right to a remedy under the Florida Wrongful Death Act, an act which creates in her a *new cause of action, Morange v. States Marine Lines, Inc.*, (Fla. 1968) 211 So.2d 161, in no way hinders the maritime operations of shipowners. Petitioner's remedy and the substantive law applicable thereto, is of local concern; it has no interstate or international implications.

Petitioner further argues that under the present rule of law Florida is free to legislate the rights and duties owed to maritime workers. There is no support for such argument. The Florida Legislature and the Florida Courts have a legitimate interest in providing a remedy for the wrongful death of Florida citizens. The Florida Wrongful Death Act creates *in Petitioner* a cause of action. Petitioner's cause of action is separate and apart from that of her deceased husband; her husband's right to a maritime remedy expired at his death.[3]

The instant case does not fall within the doctrine of uniformity established by this Court in *Jensen* and subsequent cases, and the concept of uniformity in admiralty law cannot furnish a legitimate basis for reversing the opinion of the Court of Appeals below, nor can it support reversal of *The Harrisburg* or *The Tungus*.

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[3] Congress, in passing the Jones Act, 46 USC 688, did not provide the beneficiaries of a deceased seaman with a cause of action for unseaworthiness. Further, had Petitioner's decedent been a seaman who was killed within the navigable waters of the State of Florida, she would have no cause of action for unseaworthiness even assuming the Florida Wrongful Death Act incorporated such an action. *Gillespie v. U.S. Steel Corporation* (1964), 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed. 2d 199.

B. *Principles Established by The Harrisburg and The Tungus Have Been Applied and Followed by Many Courts.*

Even prior to *The Harrisburg* (1886), 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed 358, it was recognized that there was no cause of action or remedy in admiralty for death ensuing from a maritime tort. In *Sherlock v. Alling* (1876), 93 U.S. 99, 23 L.Ed 819, the wrongful death statute of Indiana was used to provide a right and remedy for a death arising from a collision upon the Ohio River. The contention raised by Petitioner today that the use of state wrongful death statutes in admiralty does violence to the concept of uniformity was put to rest in *Sherlock v. Alling* where the Court held that application of state death statutes was not an infringement of the constitutional powers of Congress to legislate in the admiralty field. Similarly, in *Western Fuel Company v. Garcia* (1921), 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed 210, it was held that the one year statute of limitation applicable to the state wrongful death act was enforceable in admiralty. In reaching its decision the Court noted that the application of state wrongful death statutes in admiralty did not create non-uniformity:

> "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." 257 U.S. 233, 242.

Across the years there have been innumerable applications of state wrongful death statutes in the federal courts. For a sampling of these decisions see the cases collected in the Annotation: Death — State's Territorial Waters, 71 A.L.R. 2d 1296.

It is submitted that the long line of precedent for the uniform application of the principles enunciated in *The Harrisburg* and *The Tungus* preclude reversal or reatreat from those cases under the guise of uniformity.

C. *Is the Concept of Uniformity in Admiralty Jurisdiction Still Viable?*

Petitioner's brief gives the impression that the doctrine of uniformity is all pervading and will not countenance application of any substantive or statutory law other than that declared by Congress or the Federal Courts. Research indicates the contrary; that in fact there is little left of the doctrine of uniformity.

The difficulties inherent in a broad brush application of principles laid down in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed 1086, have been frequently recognized by the Courts; the consequence of this recognition has been a process of narrowing of the concept of uniformity with the concomitant expansion of the applicability of state law in cases of maritime concern but of predominately local nature. *Davis v. Department of Labor & Industries* (1942), 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed 246. The rationale of *Jensen* has been specifically restricted to state workmen's compensation statutes. *Standard Dredging Corporation v. Murphy* (1943), 319 U.S. 306, 63 S.Ct. 1067, 87 L.Ed 1416.

Outside the ambit of workmen's compensation statutes there are numerous examples of application of state law in admiralty matters. See for example: *Wilburn Boat Co. v. Fireman's Fund Insurance Company* (1955), 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed 337; *Huron Portland Cement v. Detroit* (1960), 362 U.S. 440, 80

S.Ct. 813, 4 L.Ed 2d 852; *Just v. Chambers* (1941), 312 U.S. 383, 61 S.Ct. 687, 85 L.Ed 903. In *Just v. Chambers* the Court pointed out that:

> "Uniformity is required only when the *essential features* of an exclusive federal jurisdiction are involved." 312 U.S. 383, 392. (Emphasis added.)

From the opinion in *The Lottawanna* (1874), 88 U.S. 558, 22 L.Ed 654, it is clear that the "essential features of an exclusive federal jurisdiction" concern:

> "* * * subjects of a commercial character affecting the intercourse of the States with each other or with foreign States." 88 U.S. 558, 22 L.Ed 654, 662.

It is submitted that Petitioner's case, being of a local nature, does not bring into play the doctrine of uniformity of federal law in maritime matters.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

GEORGE W. ERICKSEN
JAMES B. MCDONOUGH, JR.
of MACFARLANE, FERGUSON,
ALLISON & KELLY
P. O. Box 1531
Tampa, Florida 33601
Counsel for Respondent
Gulf Florida Terminal Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Brief of Respondent, Gulf Florida Terminal Company, have been furnished by U.S. Mail, postage prepaid, to:

Charles Jay Hardee, Jr., Esquire
Hardee, Ott & Hamilton
101 East Kennedy Boulevard
Tampa, Florida 33602
Attorneys for Petitioner

William A. Gillen, Esquire
Fowler, White, Gillen, Humkey and Kinney
220 Madison Avenue
Tampa, Florida 33601
Attorneys for Respondent,
States Marine Lines, Inc.

The Honorable Erwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530

David B. Kaplan, Esquire
Katz and Kaplan
89 State Street
Boston, Massachusetts 02109

Nathan Baker, Esquire
1 Newark Street
Hoboken, New Jersey 07030

Clerk, United States Court of Appeals for
the Fifth Circuit
Room 408, 400 Royal Street
New Orleans, Louisiana 70130

Service of the foregoing copies effected this 6TH day of February, 1970.

Attorney

APPENDIX A

91ST CONGRESS

1ST SESSION

S. 3143

IN THE SENATE OF THE UNITED STATES

NOVEMBER 14, 1969

Mr. MAGNUSON (by request) introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To amend the Act known as the Death on the High Seas Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act relating to the maintenance of actions for death on the high seas and other navigable waters", approved March 30, 1920 (41 Stat. 537; 46 U.S.C. 761 et seq.), is amended—

(1) by striking out the first section and inserting in lieu thereof the following: "That (a) this Act may be cited as the 'Maritime Death Act of 1969'.

"(b) Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring upon the navigable waters of the United States, the District of Columbia, Puerto Rico, or the territories or dependencies of the United States, or beyond such navigable waters occurring on the high seas, including acts or occurrences on fixed structures therein, the personal representatives of the decedent or the legal representatives of his estate may maintain a suit for damages in

the district courts of the United States or in any other court of competent jurisdiction, with a right of jury trial of all issues of fact for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, corporation, or other entity which would have been liable if death had not ensued.";

(2) in section 3 by striking out "two" wherever appearing and inserting in lieu thereof "three";

(3) in section 5 by striking out "of admiralty of the United States" and inserting in lieu thereof "of the United States or in any other court";

(4) in section 7 by striking out the second sentence; and

(5) by striking out section 8 and inserting in lieu thereof the following new sections:

"SEC. 8. Any action heretofore brought within two years of death shall not abate and if any action has been held time barred and dismissed, said action shall be reinstated pursuant to this Act upon application to the proper court.

"SEC. 9. If a person dies and at the time of his death has a cause of action under maritime law for any injury to his person or property as a result of the wrongful act, neglect, or default of another, the personal representatives of the decedent or the legal representatives of the decedent or the legal representatives of his estate may maintain the cause of action to recover damages for the benefit of the estate of the deceased against the alleged wrongdoer, his estate, or his legal representatives."

SEC. 2. The amendments made by this Act shall become effective after thirty days following the date of enactment of this Act.